



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2010

Mr. B. Chase Griffith
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2010-14277

Dear Mr. Griffith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 394080.

The City of Cockrell Hill (the "city"), which you represent, received a request for citizen and internal complaints, disciplinary action by the city's police department, and investigative reports and conclusions related to three named police officers. You state a portion of the requested information has been released. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim section 552.107 of the Government Code for a portion of the submitted information. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege

does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. See *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. See *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state some of the submitted information consists of confidential communications between and among city attorneys and city employees that were made for the purpose of facilitating the rendition of professional legal services to the city. You further state the communications at issue were intended to be and have remained confidential. Based on your representations and our review, we find the city may withhold the information we have marked under section 552.107 of the Government Code.¹ We note, however, that you have failed to demonstrate how the remaining information at issue consists of privileged attorney-client communications. Thus, the remaining information may not be withheld under section 552.107.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as the Medical Practices Act (the “MPA”). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

¹ As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Nos. 487 (1987), 370 (1983), 343 (1982). The medical records we have marked may only be released in accordance with the MPA. *See* ORD 598.

The submitted information also includes mental health records. Section 611.002 of the Health and Safety Code, which is also encompassed by section 552.101, provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 and 611.0045.

Health & Safety Code § 611.002(a), (b); *see also id.* § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has written consent of the patient. Health & Safety Code §§ 611.004, .0045. The mental health record we have marked in the submitted information is confidential under section 611.002 of the Health and Safety Code and may only be released in accordance with sections 611.004 and 611.0045.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that: (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation.

Ellen, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released along with the statement of the accused under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Further, since common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

A portion of the submitted information, which we have marked, concerns an investigation into allegations of sexual harassment. Upon review, we find that these documents do not contain an adequate summary of the sexual harassment investigation. Because there is no adequate summary of the investigation, the information we have marked must generally be released. However, the information contains the identity of the alleged sexual harassment victim and witnesses. Accordingly, we conclude the city must withhold the information we have marked in the documents pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*. The remaining submitted information is not intimate or embarrassing and is of legitimate public interest. Thus, none of the remaining information at issue may be withheld under section 552.101 in conjunction with common-law privacy under *Ellen*.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code.² Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, the information at issue concerns an individual who is no longer employed by the city, and

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

it is unclear whether this person is currently a licensed peace officer as defined by article 2.12. Accordingly, if the former employee is currently a licensed peace officer as defined by article 2.12, then the city must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code. Conversely, to the extent the employee at issue is no longer a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, then the city may not withhold the marked information under section 552.117(a)(2).

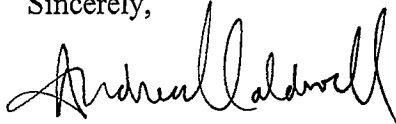
If the former employee is no longer a licensed peace officer, then the personal information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the former employee timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). Conversely, to the extent the employee at issue did not make a timely election under section 552.024, the city may not withhold the marked information under section 552.117(a)(1).

In summary, the city may withhold the information we have marked under section 552.107 of the Government Code. The city may only release the medical records we have marked in accordance with the MPA and the mental health record we have marked in accordance with section 611.002 of the Health and Safety Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. If the former employee is currently a licensed peace officer, then the city must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code. If the former employee is no longer a licensed peace officer, then to the extent he timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrea L. Caldwell". The signature is fluid and cursive, with the first name "Andrea" and last name "Caldwell" clearly distinguishable.

Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 394080

Enc. Submitted documents

c: Requestor
(w/o enclosures)